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HOMICIDE: DRUNKEN DRIVING AND MURDER

It is the purpose of this paper to present some of the aspects of the law which deal with criminal convictions of drunken drivers for murder, manslaughter, negligent homicide, or merely reckless driving, with the view in mind that a more stringent attitude be adopted both by the bar and the public in dealing with such offenders.

Murder has been defined as the unlawful killing of another with malice aforethought.¹ This characteristic must be shown to have existed, either actually or impliedly by operation of law, at the time of the commission of the crime or else the homicide will be something less than murder. Under one theory of the negligent murder doctrine the showing of actual knowledge by the defendant of the extremely dangerous consequences of the act which caused the death will imply malice. This is often referred to as the "subjective" theory in that the actor is viewed subjectively and a determination made of his actual state of mind.⁴ Under another theory of this doctrine, propounded by Mr. Justice Holmes, malice may be implied if it is found that the defendant should have known, under the circumstances, of the dangerous consequences of his act which caused death.⁵ Whether or not, in fact, the defendant had knowledge is immaterial. All that is required is that a reasonable man under the circumstances would have known that the act was one which was likely to result in death or grievous bodily harm.⁶ This theory is called by some the "objective" theory.⁷

With regard to drunkenness and its relationship to the problem of "subjectivity" and "objectivity" in determining knowledge of the dangerous consequences, it is the law today both in England and the United States, that drunkenness is not an excuse for a crime.⁸ Drunkenness may however, in some instances, prevent the state from making out the offense, specifically in those crimes

¹ MAY, CRIMINAL LAW (4th ed. 1938) 264.

STEPHEN, A DIGEST OF THE CRIMINAL LAW (1877) 161.

³ *Ibid.* " (b) Knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused; "

⁴ MORELAND, A RATIONALE OF CRIMINAL NEGLIGENCE (1944) 62.

⁵ HOLMES, THE COMMON LAW (1881) 55-56.

⁶ *Ibid.*

MORELAND, A RATIONALE OF CRIMINAL NEGLIGENCE (1944) 53.

⁸ See 79 A.L.R. 897 *et seq.* for a list of the cases.

which require specific intent.⁹ This same reasoning may apply in negligent murder cases if the subjective view is taken which requires the state to show actual knowledge of the danger.¹⁰ In such cases there will be instances, theoretically at least, when the state will not be able to make out the crime. This is due to the fact that the drunkenness of the defendant may prevent him from having actual knowledge of the dangerousness of the act which results in the death of the deceased. But, it is believed that this problem will not arise in applying the subjective test to a *drunken driver*, who, it may be *inferred*, will have sufficient control over his mental faculties to have knowledge of the danger as evidenced by his ability to do the acts necessary to drive the automobile in a manner that results in death to a human being. Therefore, it is submitted, there should be no difficulty in convicting the drunken driver of an automobile of murder under either the subjective or objective theory.

An examination of the decisions regarding homicide committed by the drunken driver shows that in the large majority of states it is punished as manslaughter under reckless driving or general manslaughter statutes.¹¹ In some few jurisdictions a new offense has been created, known as "negligent homicide."¹² The reason for the creation of this new offense, instead of applying the law of manslaughter, is to allow the state to convict reckless drivers, who kill, of homicide with milder punishment, when they might not be convicted of any homicide under the manslaughter statute.¹³

Professor Riesenfeld has stated that the modern tendency to mitigate punishment in such cases is probably due to a "popular feeling that manslaughter is not the right label for cases of homicide committed through violation of traffic rules."¹⁴ Professor Turner goes even further when he describes the purpose of the "reckless driving" statutes as allowing the jury to say, "We find that the prisoner has committed manslaughter, but we shall convict him of dangerous driving instead."¹⁵

In spite of this modern trend toward mitigation of punishment for the drunken driver who commits a killing, islands of rebellion

⁹ *Ibid.*

¹⁰ MORELAND, A RATIONALE OF CRIMINAL NEGLIGENCE (1944) 37, n. 138.

¹¹ Riesenfeld, *Negligent Homicide, A Study in Statutory Interpretation* (1936) 25 CALIF. L. REV. 1, 7; 26 AM. JURIS., Homicide, sec. 215, n. 7.

¹² *Id.* 1-7.

¹³ *Id.* at 8.

¹⁴ Turner, *The Mental Element In Crimes At Common Law* (1938) 6 CAMB. L. J. 31, 52.

¹⁵ *Ibid.*

to this "watering down" process may still be found.²⁶ It is with this vigorous minority that this writer concurs.

By statute²⁷ the State of Minnesota has created the offense of third-degree murder under which more severe cases of homicide by a drunken driver have been punished. The justification for such a statute may be found in the Minnesota case of *State v. Weltz*.²⁸ In that case the defendant, a plumber and owner of a Cadillac automobile, spent the afternoon of the crime engaged in several errands accompanied by a Mrs. Walker, with whom he resided. On his way home he stopped at a restaurant for a glass of "root beer," leaving his companion in the car. After about one-half hour, and after his companion had resorted to the summoning of a policeman to retrieve him, he staggered out of the "root beer parlor" armed with two glasses filled with the ether-smelling drink of which he had been imbibing. His companion described him as pale, face drawn, eyes staring and drowsy. When asked what had happened he failed to reply. His companion emptied the contents of the glasses out on the sidewalk and an argument ensued. Soon thereafter she jumped out of the car and the defendant drove off "rather fast." The time was about 7:30 in the evening.

Shortly thereafter, while driving very rapidly down one of the busy streets of the city he struck the deceased, who was attempting to cross the street and killed her *without stopping to investigate*. On trial, the husband of the victim testified that he heard the roar of a fast approaching car later estimated to have been traveling about 50 miles per hour. The deceased and her husband and friends were going to a movie and were about to cross the street when the deceased was struck down by the Cadillac of the defendant.

Shortly afterwards he returned in his car and scattered the crowd gathered at the scene of the homicide. Immediately, he was pursued by several policemen and, after a reckless and dangerous chase, one of the policemen boarded his car and managed to run it off the road. After a severe clubbing he was brought under control and placed under arrest. "One [of the policemen] was of the opinion that he was not so drunk he did not know what he was doing; another described him as crazy drunk; and the third as looking crazy."²⁹ Even though the defendant was in this "crazy drunk" condition the court found that he had knowledge of what he was doing.²⁹

Did not the defendant in this case exhibit that degree of wanton disregard and depravity which is evidence of the murderous mind?

²⁶ Riesenfeld, *Negligent Homicide, A Study in Statutory Interpretation* (1936) 25 CALIF. L. REV. 1, 6.

²⁷ MINN. STAT. (1941) sec. 619.10.

²⁸ 155 Minn. 143, 193 N. W. 42 (1923).

²⁹ *Ibid.*

³⁰ *Ibid.*

Would it not, under such circumstances, be a grave miscarriage of justice to punish him for less than murder? And yet, obviously, in most jurisdictions, under the reckless driving statutes, he would be convicted of manslaughter at the most. It is believed that punishment for manslaughter would not serve as a sufficient deterrent to others similarly inclined, and consequently a statute enabling convictions of murder should be enacted in all jurisdictions to cover such cases. Of course, where there is no showing of wanton disregard or depravity there should be no conviction of murder, but that does not mean that the murder statute can be dispensed with. On the contrary such cases as *State v. Weltz* point to the necessity for a statute to enable convictions when the situation calls for it. Without such a murder statute, even though the situations might warrant a conviction of murder, no such conviction is likely to be obtained.

Although in the majority of cases of homicide by a drunken driver the degree of negligence will not be sufficient to warrant a conviction of murder, there will be a number of instances where the punishment of manslaughter will not be severe enough. It may well be argued that convictions of murder when needed will be obtained under the general common law rules governing negligent homicide. But just as manslaughter statutes have been enacted to specifically apply to reckless drivers so should murder statutes be enacted. Possibilities of circumvention of the law in its endeavor to mete out the punishment commensurate with the crime committed will be further lessened. In view of the wholesale slaughter on the highways today more stringent punishment and more effective means for obtaining the same should be provided as an additional deterrent.²¹

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²¹ Wechsler and Michael, *A Rationale of the Law of Homicide* (1937) 37 COL. L. REV. 701, 1261 at 1294-98.